SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Mesaba Aviation, Inc. appeals from the final judgment and summary judgment order of the District Court declaring a March 7, 1996 "Term Sheet Proposal" to be a binding contract under New York law. Mesaba contends that the Proposal constitutes an unenforceable preliminary agreement that was never intended to be a binding contract and was superseded by the parties' subsequent course of conduct and agreements. Mesaba further contends that Plaintiffs' claim is time-barred because it was brought more than six years after the express deadline for the parties to negotiate and complete the definitive agreements contemplated by the Proposal.

Mesaba requests oral argument and suggests that 20 minutes per side would be sufficient time to present argument to the Court. Mesaba contends that oral argument would of assistance to the Court given the multiple issues presented by this appeal and the District Court's alternative summary judgment rulings.

CORPORATE DISCLOSURE STATEMENT

Appellant Mesaba Aviation, Inc. is a wholly-owned subsidiary of MAIR Holdings, Inc., a publicly-traded corporation. Northwest Airlines Corporation, a publicly-traded corporation, owns more than 10% of MAIR Holdings, Inc., through its indirect subsidiary, Northwest Aircraft, Inc.

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JURISDICTIONAL STATEMENT

Plaintiffs filed their declaratory judgment action on October 4, 2002. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because there was complete diversity between the parties and the amount in controversy exceeded $75,000.00, exclusive of interest and costs.

The District Court entered final judgment on June 14, 2004, which disposed of all parties' claims. Appellant Mesaba Aviation, Inc. filed a timely Notice of Appeal on June 28, 2004. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Erred In Concluding That A Written Proposal To Sublease Commercial Aircraft, Which Contemplated Subsequent Negotiations And Left Open Numerous Material Terms, Constituted A Binding Contract Under New York Law.

Apposite Authority:
Adjustrite Sys., Inc. v. GAB Bus., Servs., Inc., 145 F.3d 543 (2nd Cir. 1998)
Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2nd Cir. 1989)

II. Whether The District Court Erred In Relying On The Parties' Subsequent Course Of Conduct In Concluding That The Written Proposal Was A Binding Contract Where That Subsequent Course Of Conduct Was Inconsistent With And Contrary To The Terms Of The Written Proposal.

Apposite Authority:
New Moon Shipping Co. v. Man B&W Diesel, 121 F.3d 24 (2nd Cir. 1997)
Miller v. Tawil, 165 F. Supp. 2d 487 (S.D.N.Y. 2001)

III. Whether the District Court Erred In Alternatively Concluding That, As A Matter Of Law, Mesaba Failed To Negotiate In Good Faith Toward A Final Binding Agreement, Thereby Entitling Plaintiffs To Performance Of An Agreement That Was Never Completed.

Apposite Authority:
Krishna v. Colgate Palmolive Co., 7 F.3d 11 (2nd Cir. 1993)
Adjustrite Sys., Inc. v. GAB Bus., Servs., Inc., 145 F.3d 543 (2nd Cir. 1998)

IV. Whether the District Court Erred In Determining That Plaintiffs' Claim For Declaratory Relief Is Not Time-Barred Where Plaintiffs Brought Their Action For Declaratory Relief More Than Six Years After The Deadline To Negotiate, Execute And Deliver Definitive Documentation.

Apposite Authority:
N.Y. C.P.L.R § 213(2) (2002)
Martin v. Campanaro, 156 F.2d 127 (2nd Cir. 1946)

STATEMENT OF THE CASE

Plaintiffs Fairbrook Leasing, Inc., Lambert Leasing, Inc., and Swedish Aircraft Holdings AB brought this declaratory judgment against Defendant Mesaba Aviation, Inc. in the United States District Court for the District of Minnesota. Plaintiffs sought a declaration that a March 7, 1996 Term Sheet Proposal constitutes a binding contract that required Mesaba to execute long-term aircraft leases and provided Fairbrook with the discretion to unilaterally determine the duration of those leases within a 72-96 month range. Plaintiffs also requested a declaration that, pursuant to the Proposal, they had the discretion to unilaterally impose four 1-year extensions onto the 72-96 month contemplated lease term.

On December 8, 2003, the District Court (Hon. James M. Rosenbaum) entered summary judgment declaring the Proposal a binding contract that provides Fairbrook with the discretion to determine the duration of the leases within the contemplated 72-96 month range. The District Court denied Plaintiffs' summary judgment motion with regard to the four 1-year extensions because it concluded that this term was ambiguous. The District Court's opinion is reported as Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 295 F. Supp. 2d 1063 (D. Minn. 2003). Plaintiffs subsequently dismissed their remaining claims without prejudice, and the District Court entered final judgment on its summary judgment order on June 14, 2004. Mesaba appeals from this final judgment.

STATEMENT OF FACTS

A. Introduction

Fairbrook Leasing, Inc. ("FLI"), Lambert Leasing, Inc. ("Lambert"), and Swedish Aircraft Holdings AB ("Swedish Aircraft") are leasing entities owned or controlled by Saab Aircraft Leasing Holdings AB. Mesaba Aviation, Inc. ("Mesaba"), is a regional airline, which operates as a Northwest Airlink affiliate under code-sharing agreements with Northwest Airlines, Inc. ("Northwest").

On March 7, 1996, Saab Aircraft of America, Inc. ("SAAI"), FLI, and Mesaba executed a "Term Sheet Proposal For The Acquisition of Saab 340 Aircraft By Mesaba Aviation, Inc." (the "Proposal"). The Proposal was not an aircraft lease. It merely summarized the most basic terms to which the parties had agreed. The Proposal left open critical aircraft lease terms and expressly required the parties to "negotiate, execute, and deliver definitive documentation." The Proposal also made the entire transaction contingent upon approval by a third-party, Northwest Airlines.

Northwest never approved the lease transactions contemplated by the Proposal. The definitive agreement for the 340A aircraft was never completed or executed. Indeed, after Northwest became involved, a whole new negotiation began because Northwest insisted upon better financing terms, lower rental rates, and subleases that incorporated Northwest's standard terms and conditions. To

allow Mesaba to take possession of the aircraft, the parties executed short-term written leases, which differed significantly from the terms of the Proposal.

In December 1997, Saab Aircraft AB, a corporate affiliate of FLI, Lambert, and Swedish Aircraft, announced that it would discontinue manufacturing commercial aircraft. This development created serious concerns for Mesaba and Northwest, significantly altered the tenor of the ongoing negotiations, and ultimately doomed them to failure.

Mesaba nonetheless continued to fly the 340A aircraft and made lease payments pursuant to the written leases. In late 2001, Mesaba began returning the 340A aircraft to FLI. FLI accepted the first three aircraft without objection, but then, in July of 2002, asserted for the first time that the written leases and subsequent agreements of the parties were subordinate to the terms of the Proposal. FLI also claimed that it could unilaterally impose four year lease extensions for many of the aircraft pursuant to the terms of the Proposal.

Plaintiffs brought this action in October 2002, seeking a declaration that the Proposal constitutes a binding contract which allows them to unilaterally determine and extend the terms of the written leases.

B. The Proposal

The Proposal's language, which FLI drafted, is preliminary and non-committal in nature: "FLI proposes to sublease twenty (20) 340A Aircraft to

Mesaba"; "SAAI proposes to sell thirty (30) New Aircraft to Mesaba"; and the "transactions contemplated by th[e] Term Sheet" are deemed confidential. (A80, 90 (emphasis added).) The only definite term relating to the 340A aircraft is the proposed rent—$44,000 per aircraft per month. (A86.) The aircraft are not identified; the delivery schedule is "[t]o be determined;" the proposed duration of the leases is stated as a range "between 72 and 96 months;" and the aircraft were to be delivered at a "mutually agreed location." (A85-86 (emphasis added).) Indeed, by its own terms, the Proposal is merely a "summary of selected elements of the Financing Agreement"—the "primary agreement" for the 340A aircraft. (A85.) The Proposal does not address other important terms such as maintenance and refurbishment obligations, insurance obligations, limitations as to manner and location of use, stipulated loss values, delivery dates, and return conditions.

More importantly, the Proposal specifically contemplates further negotiation of the "Financing Agreement" and long-term leases for each of the 340A aircraft. (A85.) The Proposal specifically states:

> Effect Of This Term Sheet
>
> By signing this Term Sheet, SAAI , FLI, and Mesaba evidence their agreement to negotiate, execute, and deliver definitive documentation . . . no later than April, 15, 1996 . . .

(A89.) By written agreement, the parties extended the April 15, 1996 deadline to August 30, 1996. (A98.) The "Documentation" section of the Proposal lists the

various written agreements that had yet to be negotiated and the "Conditions Precedent" section specifically provides that "[n]one of the above-listed agreements shall be effective unless and until" "all such agreements have been signed by each party," and Northwest Airlines "shall have approved the transactions contemplated by such final documentation." (A89 (emphasis added).) The Financing Agreement for the 340A Aircraft was never completed or signed. (A67, 218.) Northwest never approved the long-term lease transactions in the form contemplated by the Proposal. (See A95.)

C. Neither Party Considered The Proposal To Be A Binding Agreement.

The parties considered and treated the Proposal as non-binding both before and after they signed it. On March 4, 1996, three days before he executed the Proposal, Bryan Bedford, Mesaba's CEO informed Mesaba's board of directors that the Proposal:

> will not obligate Mesaba Aviation, Inc. to complete the aircraft purchases referred to, or be binding upon it, but that its obligations to purchase, and any other obligations to SAAB AB relating to this matter, shall be set forth in a definitive Purchase Agreement to be submitted to and subject to the final approval of this Board of Directors…

(A1602 (emphasis added).) On May 22, 1996, more than two months after the Proposal was executed, Mesaba board minutes reflect that fact that a binding agreement had still not been negotiated or approved:

> Mr. Bedford informed the directors that the negotiations with SAAB Aircraft relating to the purchase or lease of aircraft had proceeded up to the point of

> agreement in principle on major terms. He requested the directors' authorization to negotiate a definitive agreement or agreements to effectuate Mesaba's intention.

(A1605 (emphasis added).) Mesaba's board authorized Bedford to negotiate the acquisition of up to 72 Saab 340 aircraft. (A1605.) Although Plaintiffs subsequently asked Mesaba to sign long-term leases, they repeatedly acknowledged that long-term leases for the 340A aircraft would still need to be approved by Mesaba's board of directors. (A1648, 1650, 1652.)

Henrik Schroder, FLI's former CEO and chief negotiator, testified regarding the purpose of the Proposal:

> It is a term sheet. It is meant to capture the essence of the transaction. It is not meant to legally hash out the consequences of those agreements. That's for later. . . .
>
> The term sheet, the way it was used by us was basically a commercial agreement between the parties of the major commercial issues in a transaction. It did not deal with specific issues . . . of a legal nature as to rights and obligations of the parties.

(A51, 68-69 (emphasis added).) He further acknowledged that the Proposal contemplated a subsequent binding lease agreement:

> So once you go from the principal understanding of the term sheet into a physical delivery, we have to execute all the agreements that bind all the parties together so that Mesaba can have quiet enjoyment of that aircraft and operate it in accordance with its operating certificate.

(A66 (emphasis added).)

Gena Laurent, FLI's assistant vice president, acknowledged internally after she executed the Proposal that the parties were trying to establish a "schedule for negotiations." (A1606.) Six weeks later, they were still trying to "work out some of the commercial issues." (A1607.) Laurent also recognized that the Proposal included a "deadline" for the negotiation and completion of the definitive agreements and acknowledged the "potential risks involved" if this deadline was not met. (A1561, 1568, 1609.)

In May of 1997, fourteen months after the Proposal was signed, Laurent told her colleagues that the parties still had not agreed on the term of the subleases or even who the sublessee would be: "[W]e need to settle on the term of the Mesaba 340A subleases as well as who will be Sublessee (NWA or Mesaba)." (A1366 (emphasis added).) A year later, in 1998, Ms. Laurent was still telling her supervisors that "we will do our best to persuade Mesaba to enter into long term []leases." (A1367 (emphasis added).)

D. The Actual Lease Agreements

Because Mesaba operates as a Northwest Airlink affiliate, Northwest dictates both the aircraft and the flights flown by Mesaba. Accordingly, FLI understood that "Mesaba was not acting alone in this transaction," and that Northwest was "heavily" involved in the negotiations. (A48.)

Schroder, FLI's former CEO, candidly testified that the entire deal had to be reworked when Northwest became involved in the post-Proposal negotiations. "There is sort of post- and pre- March 7 [the Proposal signing date], because what happens afterwards then is that a lot of things doesn't pan out exactly as was contemplated." (A1968.) There was a "whole new negotiation" after the Proposal was signed and there were "a lot of issues thrown up in the air." (A61, 62.) Northwest representatives insisted on better financing terms, substantially lower rent, and subleases that incorporated Northwest's standard terms and conditions. (A59-60, 63, 64, 93.) There were also "legal, tax, structural and financing issues" that had to be negotiated or renegotiated. (A65.)

Schroder acknowledged that FLI would not allow Mesaba to take possession of aircraft without actual lease agreements in place. (A75.) To allow Mesaba to take possession of the aircraft while these negotiations continued, FLI, Mesaba, and Northwest negotiated and executed separate short-term written lease agreements for each of the 340A aircraft. (See A227-1363.)

In contrast to the Proposal, Schroder confirmed that FLI considered the written sublease agreements to be the actual agreements:

> [F]rom our perspective, once all the aircraft are delivered, the sublease agreement constitutes the original agreement filed between the two parties as it relates to the issue of that aircraft.

(A79 (emphasis added).) Consistent with this understanding, many of the short-term leases include an integration clause specifically stating that:

> This instrument, including all appendixes, constitutes the entire agreement between the parties. . . . . No term or provisions of the Lease may be changed, waived, amended or terminated except by written agreement signed by both parties.

(A251-52, 316, 362, 435, 489, 873, 900, 1015, 1118, 1114, 1343.) All but one of the short-term leases state that they are "interim leases" and many confirm that agreement on a longer term lease was still "pending." (A316-17, 362, 436, 537-38, 654, 720, 793, 873, 900, 926, 970, 1015, 1079, 1118, 1144, 1172, 1214, 1258, 1298, 1343.)

E. The Actual Lease Terms Were Inconsistent With The Proposal.

The Proposal contemplated lease payments of $44,000 per month per aircraft. (A86.) Mesaba and Northwest subsequently negotiated a $13,000 per month rent rebate that reduced the effective rent to $31,000 per month per aircraft. (See, e.g., A2046.)

The Proposal contemplated that Mesaba would sublease each of the 340A aircraft from FLI, subject to an existing headlease.[1] (A85.) The Proposal further contemplated that the term of the 340A subleases would be:

> At FLI's option, and depending on the remaining term of the applicable Head Lease, the term of each Sublease will be between 72-96 months, with best efforts to obtain four (4), one (1) year extensions at the same Basic Rent.

(A86 (emphasis added).) The parties bypassed the contemplated headleases and directly leased nearly half of the 340A aircraft from Lambert and Swedish Aircraft, neither of which is a party to the Proposal. (A228, 293, 339, 412, 466, 852, 879, 1097, 1123.)[2] With respect to those aircraft that were subject to a headlease, FLI acknowledged that it never provided Mesaba with copies of those headleases and felt no obligation to inform Mesaba of the dates on which those headleases expired. (A1982, 2020.)

Bedford testified that the proposed range of terms contemplated by the Proposal (72-96 months) was intended to accommodate, and was subject to, Mesaba's stated desire to not operate any of the used aircraft beyond the 17th

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[1] An aircraft lease can take several different structures. In its simplest form, the operator leases the aircraft directly from the owner—a "direct lease." Alternatively, the aircraft may be owned by a financing company and leased back to the leasing company. The leasing company then subleases the aircraft to the operator. In this arrangement, the financing lease is normally referred to as a "headlease" and the operating lease is referred to as a "sublease."

[2] Federal regulations prohibit domestic carriers from directly leasing commercial aircraft from foreign entities. Accordingly, the aircraft leased through Swedish Aircraft were leased from domestic trust companies.

anniversary of its date of manufacture. (A1985-86, 1988-89, 1990-91.) FLI's "confidential" documents similarly reflect the parties' agreement that "[t]he term of the 340A's must fit into the original requirement that the term can vary between 7 or 8 years, provided that the absolute age of a Saab 340A cannot be more than 17 years at the end of a lease term." (A2203-04 (emphasis added).)

The Proposal contemplated that each sublease agreement would conform with FLI's standard sublease agreement, but the parties subsequently agreed that all the sublease agreements would include standard Northwest terms and conditions. (A85, 63-64.) The Proposal contemplated subleases varying from 72-96 months, but the actual lease agreements were (with one exception) short-term, renewable agreements. (A255, 320, 366, 439, 493, 566, 673, 747, 808, 850, 876, 902, 942, 977, 1026, 1095, 1121, 1187, 1229, 1274, 1314, 1360.)

Northwest Airlines approved these initial short-term leases to Mesaba with the understanding that the 340A aircraft would subsequently be transferred to and leased by Northwest Aircraft, a separate holding company. (A95.) Consistent with this approval, many of the short-term leases specifically state that the contemplated long-term lease will be with Northwest Aircraft, Inc. (See, e.g., A873, 900, 1118, 1144.)

F. Plaintiffs Assert Substantially Longer Lease Terms In 2002.

After the parties executed short-term leases, they continued to negotiate potential long-term leases for the 340A aircraft. These negotiations failed following the December 1997 announcement by Saab Aircraft AB that it intended to discontinue manufacturing commercial aircraft and leaving the turbo-prop aircraft business. (A209.) Saab's decision to stop producing aircraft created serious concerns for Mesaba and Northwest as to whether poor mechanical performance and the cost of spare and replacement parts might render the entire fleet of 340 aircraft uneconomical to operate in the future. (A76-77, 78, 212-215.)

Despite the parties inability to agree on long-term lease terms, Mesaba continued to fly and make the reduced $31,000 monthly lease payments on all of the 340A aircraft pursuant to the short-term leases. In December 1998, FLI proposed long term lease extensions for all twenty-three of the 340A aircraft. (A936-945.) These proposed agreements were not the long-term leases contemplated by the Proposal. They were instead "letter agreement" extensions of the existing written leases, which were subject to approval by Mesaba's board. (Id.)

In November 2000, more than four years after signing the Proposal, Mark Pugliese, FLI's executive vice president, wrote to Mesaba asking for confirmation that the 340A aircraft were being leased:

> on the same terms and conditions as those which were in force on first delivery to [Mesaba] of such aircraft <u>pursuant to the relevant written</u>

> sublease agreement, save in respect of the term of such leases which is subject to further agreement of the parties.

(A1368 (emphasis added).) Mesaba responded by confirming that the 340A aircraft were being leased pursuant to the written sublease agreements and that the duration of those leases "was subject to further agreement." (A210 (emphasis added).) At no time while the parties were negotiating long-term leases did FLI ever suggest that the aircraft were already subject to the lease termination dates it now claims were mandated by the Proposal. (A216-17.)

Late in 2001, Mesaba began to return several of the 340A aircraft to FLI. FLI did not object to the return of the first three aircraft (Aircraft Nos. 102, 103, 107), which were returned consistent with the long-term lease dates previously proposed by FLI. (See A1646-47.)

In July of 2002, after Mesaba had returned the first three 340A aircraft, FLI asserted, for the first time, that the lease durations contemplated in the Proposal superseded the subsequently executed written leases (which had been extended by agreement of the parties). (A1464-66.) FLI claimed that the Proposal's 72-96 month variable term governed each short-term lease, that it could unilaterally dictate the term of each of the leases, and that, for many of the aircraft, it could unilaterally impose additional four-year lease extensions beyond 96 months. (A1464-66.) Thus, according to FLI, most of the short-term leases actually extend through 2006, 2008, 2009, or 2010—ten, twelve, thirteen and even fourteen years

past the execution of the Proposal. (A20, 1466.) Based upon these new dates, FLI contends that Mesaba is obligated to lease the 340A aircraft for an additional 831 lease months (an additional $25,761,000 in lease payments) beyond what FLI had actually suggested after the Proposal was executed. (Compare A20, 1466 with A1644-1653.)[3]

G. The District Court's Decision

Plaintiffs brought this declaratory judgment action against Mesaba in October 2002, requesting a declaration that the 1996 Proposal is a fully binding contract that obligated Mesaba to executes lease for the 340A aircraft through the dates they first alleged in July of 2002.

The District Court, in its summary judgment ruling, held that the Proposal constitutes a fully-binding contract. Alternatively, the District Court concluded that the Proposal constitutes a preliminary agreement that obligated Mesaba to negotiate in good faith toward a final binding agreement. The District Court further concluded, as a matter of law, that Mesaba breached that obligation by refusing to continue to negotiate after Saab Aircraft AB announced that it would discontinue production of the 340A aircraft. Based on these rulings, the District Court declared that the "Term Sheet expressly grants FLI the authority to

[3] A comparison of the lease termination dates previously suggested by FLI (A1644-1653) with the lease termination dates FLI first asserted in 2002 (A20, 1466) reflects 831 additional lease months in the 2002 termination dates. At $31,000 per month, this represents $25,761,000 in additional lease payments.

determine the lease duration within the range of 72 to 96 months, subject to the terms of any applicable head lease."

The District Court rejected Mesaba's contention that Plaintiffs' declaratory judgment action was time-barred because it was filed more than six years after both the original and extended deadlines established by the Proposal for the parties "to negotiate, execute and deliver definitive documentation." The District Court concluded that, by continuing to negotiate past the deadline, the parties created a new implied contract with the same terms as the written Proposal.

SUMMARY OF ARGUMENT

The District Court erred in concluding that the Proposal constituted a fully binding contract. Under New York law, a preliminary agreement cannot constitute a binding contract unless "the parties have reached complete agreement on all of the issues that require negotiation." In this case, the Proposal established both a framework and a deadline for those negotiations, but it did not address and left open numerous material terms. The most important term—whether it would be binding—was expressly made contingent on the negotiation and completion of "definitive" agreements and the approval of Northwest Airlines. The parties' objective conduct, both before and after executing the Proposal, similarly reflects their understanding that the Proposal was never intended to be a binding agreement.

The District Court also erred by relying upon the parties' partial performance as evidence of intent to be bound, because the parties' subsequent conduct was wholly inconsistent with the terms of the Proposal. The most material terms were not even followed: the aircraft were leased from different parties, the rental rate paid was significantly lower than that included in the Proposal, and the duration of the leases were expressly left to subsequent negotiation and agreement. Mesaba's continued use of and payment for the 340A aircraft through 2001 may raise factual issues regarding the existence or terms of a subsequent agreement. That course of

conduct, however, does not evidence any intent to be bound by the terms of the Proposal because it was inconsistent with and contrary to the terms of the Proposal.

The District Court alternatively concluded that, even if it were not an enforceable agreement, the Proposal obligated Mesaba to negotiate in good faith and that Mesaba breached this obligation. The District Court erred by resolving this factual issue in the context of a summary judgment motion. The District Court further erred by concluding, as a matter of law, that this purported breach of the obligation to negotiate in good faith entitled Plaintiffs to performance of the "agreement" that was never completed. Under New York law, the remedy for breaching a duty to negotiate in good faith is neither performance nor lost profits.

Finally, the District Court concluded that the Proposal's deadline for finalizing the agreements requiring further negotiation did not trigger the statute of limitations because the parties' subsequent negotiations implicitly created a new contract and extended the deadline. The District Court erred because, under New York law, subsequent unsuccessful negotiations do not result in an implied contract.

ARGUMENT

I. The District Court Erred In Concluding That The Term Sheet Proposal Was A "Type I" Binding Agreement.

The District Court erred in concluding that the Proposal is a binding contractual agreement. The Proposal's preliminary language, the express contemplation of further negotiation and formal agreements, the absence of critical material terms, the transaction's complex nature, and the parties' prior and subsequent course of conduct all mandate the conclusion that the Proposal is not and was never intended to be a binding contract.[4]

Under New York law, there is a strong presumption that a preliminary agreement does not create a binding contract where the parties contemplate further negotiations and the execution of a formal instrument. Adjustrite Sys., Inc. v. GAB Business, Servs., Inc., 145 F.3d 543, 548 (2nd Cir. 1998). Exceptions to this rule are limited to "Type I" binding agreements and "Type II" preliminary agreements.

A Type I agreement is a fully binding contract, which is created when the parties agree on "all the points that require negotiation" but agree to memorialize their agreement in a more formal document. Adjustrite, 145 F.3d at 548. Such an agreement is binding just as if it were a formalized agreement, because the more

[4] The District Court's summary judgment ruling is reviewed *de novo* by this Court. See County of Mille Lacs v. Benjamin, 361 F.3d 460, 463 (8th Cir. 2004).

elaborate contract is a mere formality. Id. To be a binding agreement, however, all of the terms must have been agreed upon such that there is "literally nothing left to negotiate or settle." R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 76 (2nd Cir. 1984); accord Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 72 (2nd Cir. 1989) (explaining that a fully binding agreement requires "complete agreement on all of the issues that require negotiation").

A Type II preliminary agreement is a "binding preliminary commitment," which is created "when the parties agree on certain major terms, but leave other terms open for future negotiation." Adjustrite, 145 F.3d at 548. Parties to a Type II preliminary agreement "accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement." Id.

There are two important differences between a Type I binding agreement and a Type II preliminary agreement. First, a party to a Type I binding agreement may demand performance of the transaction even though the more formal document was never executed. See Adjustrite, 145 F.3d at 548. In contrast, a party to a Type II preliminary agreement "has no right to demand performance of the transaction." Id. If the parties fail to reach a final agreement after making a good faith effort to do so, there is no further obligation. Id. Second, the breach of a Type I binding agreement gives rise to a normal claim for damages, including lost profits. In contrast, the breach of a Type II preliminary agreement (the failure

to negotiate in good faith) does not give rise to a claim for lost profits from the contemplated agreement. See Gorodensky v. Mitsubishi Pulp Sales (MC) Inc., 92 F. Supp. 2d 249, 255 n.2 (S.D.N.Y. 2000), aff'd, 242 F.3d 365 (2nd Cir. 2000); Goodstein Constr. Corp. v. City of New York, 604 N.E.2d 1356, 1360-61 (N.Y. 1992). [5]

To determine whether a preliminary agreement constitutes a Type I binding contract, a Type II agreement to negotiate in good faith, or an unenforceable "agreement to agree," New York courts examine five factors: (1) the language of the agreement; (2) the existence of open terms; (3) whether there has been partial performance; (4) the necessity of putting the agreement in final form, as indicated by the customary form of the transaction; and (5) the context of the negotiations surrounding the preliminary agreement. Adjustrite, 145 F.3d at 548 & n.6. The District Court erred in its analysis of these factors and in concluding that the Proposal is a Type I enforceable agreement.

1. The Proposal's language reflects its preliminary nature.

A document's language is "the most important" factor in determining whether the parties intended it to be a binding agreement. Adjustrite, 145 F.3d at 549; Arcadian, 884 F.2d at 72. The Proposal's language is preliminary and non-

[5] The non-breaching party to a Type II preliminary agreement is entitled to bring an action to recover its "out of pocket" damages—those sums spent in anticipation of the contemplated transaction. Goodstein Constr. Corp., 604 N.E.2d at 1359.

committal in nature and demonstrates that the parties did not intend to be bound by its terms. The Proposal is titled, "Term Sheet Proposal," a preliminary, non-binding phrase. The Proposal begins by stating that "FLI proposes to sublease twenty (20) 340A Aircraft to Mesaba" and that "Mesaba will also acquire options for twelve (12) Option 340A Aircraft." (A80.) The Proposal concludes by referring to the transactions "contemplated" by the Proposal. (A90.)

New York courts have recognized that titles and terms such as "Proposal" and "Term Sheet" are compelling evidence that a document is not intended to be binding. See, e.g., Adjustrite, 145 F.3d at 549 (focusing on the document's title—"proposal"—and language that the party "desires" to purchase computer software assets and a related license, to conclude that it was not binding); Ogden Martin Sys. of Tulsa, Inc. v. Tri-Continental Leasing Corp., 734 F. Supp. 1057, 1069 (S.D.N.Y. 1990) (finding "term sheet" unenforceable despite such language as "commitment" and "firm proposal); Kreiss v. McCown DeLeeuw & Co., 37 F. Supp. 2d 294, 300 (S.D.N.Y. 1999) (finding "term sheet" unenforceable in light of language contemplating subsequent, "definitive" documentation).

The District Court concluded that the Proposal's language "merely indicates that scrivener work—'definitive documentation'-remains to be done." (A2234.) That conclusion is at odds with the actual language of the Proposal, which gave the parties five weeks "to negotiate, execute and deliver definitive documentation."

That conclusion is also at odds with the fact that the parties agreed on three separate occasions to extend the deadline to "complete negotiation, execution and delivery of definitive documentation." (A96-98.)

The Proposal listed the various "definitive" written agreements contemplated by the parties (including the Financing Agreement in which the parties' commitments regarding the 340A aircraft would be "more fully described") that had yet to be negotiated or completed. (A85.) The Proposal then specifically stated that "[n]one of the above-listed agreements shall be effective unless and until" "all such agreements have been signed by each party." (A89 (emphasis added).) The Proposal's own terms acknowledge that it is not a binding agreement because it expressly makes the effectiveness of each contemplated "definitive" agreement subject to the negotiation and completion of all of the contemplated agreements.

New York courts repeatedly have recognized that this type of express reservation—making the contemplated transaction contingent on future written agreements—compels the conclusion that the preliminary agreement cannot constitute a binding contract. See, e.g., Adjustrite, 145 F.3d at 549-50 (no binding commitment where "agreement" was expressly contingent on execution of formal "sales agreement contract"); Arcadian, 884 F.2d at 72 ("reference to a binding sales agreement to be completed at some point in the future" demonstrated that

there was no intent to be bound). Indeed, when a preliminary agreement includes this type of express reservation, a court "need look no further than the first factor" to determine that it is not an binding contract. Arcadian, 884 F.2d at 72.

The District Court, in its analysis, focused on the Proposal's "length, formality, and completeness" to support its conclusion that "this document defines the parties' obligations and is not a mere invitation for them to continue to negotiate." (A2234.) But FLI's former CEO acknowledged that the terms of the Proposal relating to the used 340A aircraft are only a page and a half long. (A70.) Moreover, the "formality" of the language is not a recognized factor under New York law, and, as explained below, the Proposal was far from complete in that it left open numerous material terms.

The District Court concluded that the Proposal "explicitly resolves future issues which may arise as the conforming documents are drafted" by specifying that, in the event of a conflict with any subsequent draft agreements, the Proposal's terms "shall prevail." (A2235.) But the language referred to by the District Court actually provides that the terms of the Proposal "shall prevail" over prior drafts of the agreements. (A89.) By doing so, the Proposal established a framework for future negotiations, but it provided no means for filling in those numerous terms left open by the Proposal, and no means of resolving any conflicts regarding those open terms should the parties be unable reach agreement.

The District Court's conclusion that the terms of the Proposal resolved any potential future issues is also contradicted by the parties' own conduct. Mesaba and FLI, by immediately renegotiating even those terms that were set forth in the Proposal, obviously recognized that this language did not create a binding agreement.

The District Court also noted that the Proposal called for Mesaba to make a $500,000 down payment and viewed this language as compelling evidence that "neither party's performance was contingent on further or formal documentation." (A2235.) The Second Circuit has rejected this analysis. See Arcadian, 884 F.2d at 71 (preliminary agreement found completely non-binding despite tender of $687,500 non-refundable deposit and other "considerable" performance). Because the language of the Proposal was preliminary in nature and because the Proposal expressly made the contemplated transactions contingent on the completion of final documents, the District Court erred in determining that the language of the Proposal supported the conclusion that it was a fully-binding contract.

2. The openness and omission of important terms evidences the Proposal's non-binding nature.

The second factor, the existence of open terms, also weighs heavily against the District Court's conclusion that the Proposal is a Type I binding agreement. Preliminary agreements that do not address or leave open substantive terms are presumed to be unenforceable. Adjustrite, 145 F.3d at 550. In this case, the

undisputed evidence clearly establishes that that parties had not and never did "reach[] complete agreement on all of the issues that require[d] negotiation." Arcadian, 884 F.2d at 72. The Proposal could not, therefore, constitute a fully binding Type I agreement.

The Proposal addresses general issues such as the basic rent and the number and type of aircraft, but leaves open many important terms such as maintenance and refurbishment obligations, insurance obligations, limitations as to manner and location of use, stipulated loss values, and return conditions. Although the District Court characterized these details as "cavils," that conclusion is at odds with the evidence. FLI's former CEO acknowledged that "there [we]re open issues that seems to have prohibited the parties from coming to a final conclusive decision." (A73.) He also acknowledged that the Proposal was incomplete: "[I]t was clear that the absence of a well defined document at that stage came to haunt the parties. I mean we were not able to enforce our positions on some points because we basically only had the term sheet agreement." (A58.)

The District Court's characterization of the existence of these open terms as "cavils" is also directly at odds with New York case law. In a case similar to this, a federal district court in New York found that the omission of these same material terms in an aircraft lease agreement "weigh[ed] heavily in favor of finding that the parties did not intend to be bound by the agreement." Henchman's Leasing Corp.

v. Condren, No. 87 CV 6478(PNL), 1989 WL 11440, at *6 (S.D.N.Y. Feb. 8, 1989) (A1379-85.) The court held that missing terms related to return conditions, insurance coverage, the lessee's rights for modification and maintenance obligations, and limitations of aircraft use were all terms "of sufficient importance to give substantial support to defendants' position that [the preliminary agreement] was not intended as a binding contract." Henchman's, 1989 WL 11440, at *5-6.

A comparison of the Proposal to the contemplated agreements and subsequent short-term leases reveals the many details left unaddressed by the Proposal. See Henchman's, 1989 WL 11440, at *6 (comparing preliminary agreement to a subsequent lease draft that contained extensive provisions concerning insurance coverage, use and maintenance). The Proposal contains a one and a half page summary of terms applicable to the 340A aircraft. An unsigned draft of the Financing Agreement and proposed form for the long-term subleases prepared by FLI after the Proposal was executed includes more than 100 pages of specific terms. (A99-205.) Each of the short-term leases are nearly forty pages long. (A228-1363.) These documents demonstrate the types of terms material to an aircraft lease agreement, including detailed payment information, insurance provisions, areas of allowable use, return condition of the aircraft, assumption of loss or damage, responsibilities of sublessee, maintenance provisions, allocation of risk clauses, and the parties' respective remedies in the

event of default. As in Henchman's, the absence of such crucial terms compels the conclusion that the Proposal is not an enforceable contract.

3. The Parties Performed Under Different Terms Than Were Contemplated By The Proposal.

Mesaba took possession of and leased 340A aircraft under different terms, at a different price, and from different parties than were contemplated by the Proposal. The District Court therefore erred in concluding that this "partial performance" supported enforcement of the Proposal as a Type I binding agreement. Subsequent performance and a course of conduct that is inconsistent with a preliminary agreement cannot logically support the conclusion that the preliminary agreement is a complete and binding agreement.

While partial performance consistent with the terms of a preliminary agreement may indicate that the parties intended to be bound, it is subordinate to the actual language of the agreement. See, e.g. Adjustrite, 145 F.3d at 550 (finding no binding obligation even while assuming party partially performed contract); Arcadian, 884 F.2d at 73 (considering the preliminary nature of the language and the presumption against binding contracts, no obligation existed "even though there was considerable partial performance"). Here, the parties ignored the terms of the Proposal, significantly changed the nature and terms of the transaction, added two new parties to the lease agreements, agreed to significantly reduce the monthly lease payments, executed short-term leases with new and different terms

(including integration clauses), and expressly agreed to leave the duration of the leases open to further agreement.

Schroder explained that there was "a whole new negotiation" after Northwest became involved. Suddenly, none of the terms in certain sections of this [Proposal] were relevant anymore, okay." (A61.) There were "legal, tax, structural and financing issues" that had to be renegotiated. (A65.)

The parties' subsequent performance under separate short-term leases that made no reference to the Proposal likewise cannot be considered "partial performance" militating towards enforceability of a preliminary agreement. See Miller v. Tawil, 165 F. Supp. 2d 487, 493 n.8 (S.D.N.Y. 2001) (the existence of a short-term "interim agreement" confirmed the lack of intent to be bound to a long-term contract and actually negated any "partial performance" of the originally contemplated long-term contract). In fact, the parties expressly agreed in 2000 that the 340A aircraft were being leased, not pursuant to the Proposal, but

> on the same terms and conditions as those which were in force on first delivery to [Mesaba] of such aircraft pursuant to the relevant written sublease agreement, save in respect of the term of such leases which is subject to further agreement of the parties.

(A210, 1368 (emphasis added).)

The District Court found that partial performance "strongly supports the conclusion that the Term Sheet is a binding contract. Plaintiffs delivered, and defendant paid for, 23 aircraft, even in the absence of final documents. This

occurred using only the Term Sheet." (A2238.) The evidence is contrary to that finding. Schroder acknowledged that FLI could not deliver the aircraft on the basis of the Term Sheet alone:

> Q. Have you ever released an aircraft to a lessor on the basis of a signed term sheet, without executing an actual lease or sublease agreement?
>
> A. You can't do that.
>
> . . . .
>
> So once you go from the principal understanding of the term sheet into a physical delivery, we have to execute all the agreements that bind all the parties together so that Mesaba can have quiet enjoyment of that aircraft and operate it in accordance with its operating certificate.

(A75, 66 (emphasis added).) This of course is why the parties executed short term leases and, when those short term leases expired, agreed to continue the terms and leave the duration of those leases open to further agreement. The parties' execution and then extension of the short-term leases and the parties' agreement to be bound by the terms of those leases even after they expired demonstrate that the parties were performing consistent with the short-term leases, and not the Proposal.

4. Aircraft leases customarily require comprehensive and detailed terms and documentation.

The sheer magnitude of the transactions contemplated by the Proposal further demonstrates that the Proposal is not and could not be a binding contract. New York courts frequently consider the size, nature, and length of the contemplated commitment to determine whether a preliminary document is binding. Adjustrite, 145 F.3d at 551; see also Missigman v. USI Northeast, Inc., 131 F. Supp. 2d 495, 509 (S.D.N.Y. 2001) (the complexity of an asset purchase made the contract "clearly" of the type that would be embodied in a "formal contract complete with all standard provisions usually found in sophisticated, formal contracts"); Gorodensky, 92 F. Supp. 2d at 256 (the parties did not suggest they intended to be bound by memorializing a five-year commitment worth millions of dollars in a document slightly over a page long).

Schroder testified that this was the largest deal he worked on while he was at FLI. (A74-75.) The Proposal contemplates more than $84,000,0000.00 in lease payments for the 340A aircraft over a six to eight year period. This transaction would not be memorialized by a page-and-a-half excerpt of a "Term Sheet Proposal." See Gorodensky, 92 F. Supp. 2d at 256. As Schroder explained, "[t]his business is not conducted on the back of a napkin. Let's put it that way. It takes lots of analysis and computations." (A52-53.) The nature and the complexity of

the contemplated transactions weigh heavily in support of the conclusion that that Proposal was not a Type I binding agreement.

5. The "context of the negotiations" conclusively demonstrates that the Proposal was never intended to be a binding contract.

The fifth factor considered by New York courts to classify preliminary agreements is the context of the negotiations surrounding the preliminary agreement. Adjustrite, 145 F.3d at 549 n.6. In this case, the context of those negotiations conclusively demonstrates that the Proposal was never intended to be a binding contract.

Three days before he executed the Proposal, Mesaba's CEO informed his board of directors that it was not a binding commitment and would not obligate Mesaba to complete the transactions. (A1602.) Schroder, who executed the Proposal as FLI's CEO, agreed:

> It is a term sheet. It is meant to capture the essence of the transaction. It is not meant to legally hash out the consequences of those agreements. That's for later.

(A51.) There were "a lot of issues thrown up in the air" after the Proposal was signed. (A61, 62.) "There is sort of post- and pre- March 7, because what happens afterwards then is that a lot of things doesn't pan out exactly as was contemplated." (A1968.) "[L]egal, tax, structural and financing issues" had to be renegotiated. (A65.) Because the parties were unable to come to terms on long-term leases, they executed short-term, renewable leases that made no reference to the Proposal,

constituted the "entire agreement" between the parties, and confirmed that an agreement on long-term leases was still "pending." This context confirms that none of the parties considered or intended the Proposal to be a binding document.

FLI's own documents confirm its understanding that the Proposal was not a binding document. In 1997, more than a year after the Proposal was executed, FLI was still trying to "settle on the term of the Mesaba 340A subleases as well as who will be Sublessee (NWA or Mesaba)." (A1366.) Two years after the Proposal was signed, FLI was still trying to "persuade Mesaba to enter into long term []leases." (A1367 (emphasis added.)

Finally, the long-term leases actually proposed by Plaintiffs confirm that the Proposal was never intended to be a binding document. In December of 1998, FLI, Lambert, and Swedish Aircraft forwarded proposed long-term lease agreements to Mesaba which acknowledged that any long-term leases would still need to be approved by Mesaba's Board of Directors:

> FLI acknowledges that Mesaba's agreement as set forth herein is subject to the approval of its Board of Directors. Mesaba shall diligently pursue obtaining such approval during January 1999. This agreement shall be null and void unless Mesaba either notifies FLI in writing that the requisite approval has been obtained or that Mesaba has waived the requirement for Board approval, in either case no later than January 31, 1999.

(A1648, 1650, 1652.) If the Proposal had been a fully binding contract that required Mesaba to execute long-term leases, there would be no reason to acknowledge that long-term leases still needed to be approved by Mesaba's board.

This fifth factor, the "context of the negotiations," therefore confirms that the Proposal was not a binding contract.

II. The District Court Erred In Relying On The Parties' Subsequent Course Of Conduct To Support Its Conclusion That The Parties Intended To Be Bound By The Original Terms Of The Proposal.

In support of its conclusion that the Proposal is a binding contract, the District Court focused heavily on the parties' conduct after signing the Proposal. The District Court recognized that much of this conduct was inconsistent with the terms of the Proposal, but concluded that the parties had, through that conduct, simply amended the terms of the Proposal. This was error.

Partial performance that is inconsistent with the terms of a preliminary agreement does not support the conclusion that the parties intended to be bound by the original terms of the preliminary agreement. See Miller, 165 F. Supp. 2d at 492 n.7. Mesaba leased the 340A aircraft from different parties, on different terms and conditions, and for a different price than was contemplated by the Proposal. The evidence also reflects the parties' subsequent agreement: 1) that none of the aircraft would be flown beyond its seventeenth year of life; 2) that Mesaba would continue to operate the 340A aircraft under the terms of the written leases that had been executed; and 3) that the duration of those leases would be left open for "further agreement."

At no time prior to 2002 did FLI, Lambert, or Swedish Aircraft ever suggest that Mesaba was obligated to execute the long-term leases they now assert. (A216-17.) The long-term leases they did ask Mesaba to sign were substantially shorter than the leases they claimed six years later and expressly acknowledged that any long-term leases were contingent on approval from Mesaba's board. (A1644-69.)

Evidence of the parties' subsequent course of conduct, viewed in a light most favorable to Mesaba, indicates that the parties superseded the terms of the Proposal through their subsequent agreements and performance. The parties agreed on short-term, renewable leases, they agreed to extend those leases, and then they agreed to leave the return date open to further agreement. This same evidence directly contradicts the District Court's conclusion that:

> the Term Sheet expressly grants FLI the authority to determine the lease duration within the range of 72 to 96 months, subject to the terms of any applicable head leases.

(A2247.) Because the parties' course of conduct is inconsistent with the terms of the Proposal, that evidence necessarily raises factual issues regarding the terms of any agreement established or modified by that conduct. See New Moon Shipping Co. v. Man B&W Diesel, AG, 121 F.3d 24, 31 (2nd Cir. 1997). Because the District Court found a modification of the Proposal by subsequent conduct, the terms of that modification are necessarily a question of fact that cannot be resolved in a summary judgment motion.

The practical effect of the District Court's error is best illustrated by the windfall Plaintiffs are seeking to gain through this litigation. By stating that Plaintiffs can impose on Mesaba fictional lease dates that were never even proposed during the parties' prior course of dealings, the District Court's opinion suggests that Plaintiffs should be placed in a better position than they would have been if Mesaba had executed the long-term leases that were actually proposed. New York law, however, provides that "breach of contract damages are measured from the date of the breach" and "should put the plaintiff in the same economic position he would have occupied had the breaching party performed the contract." Oscar Gruss & Sons, Inc. v. Hollander, 337 F.3d 186, 196 (2nd Cir. 2003). By failing to recognize factual issues raised by the actual course of dealings between the parties' the District Court's opinion allows Plaintiffs to claim over $25,000,000 in additional lease payments based upon leases that were never agreed upon and termination dates that were never even proposed or considered by the parties.[6] The District Court's opinion should therefore be reversed.

[6] In fact, this Court is entitled to take judicial notice of the fact that Plaintiffs subsequently filed an action for breach of contract alleging in excess of $35,000,000.00 in lease payments due as a result of the District Court's summary judgment ruling in this action. See Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., No. 04-CV-3791 MJD/JGL (D. Minn.) (Plfs.' Compl. at Exs. E-F.)

III. The District Court Erred In Concluding, As A Matter Of Law, That Mesaba Failed To Negotiate In Good Faith.

The District Court alternatively found that the Proposal constituted a Type II preliminary agreement that obligated Mesaba to negotiate in good faith toward completion of the final agreements contemplated by the Proposal. (A2240.) The District Court then went on to conclude, as a matter of law, that Mesaba had breached its obligation to negotiate in good faith. In support of this conclusion, the District Court stated that:

> Mesaba's refusal to continue negotiating long-term leases may not involve subjective bad faith, but nonetheless constitutes a breach of its obligations under the Term Sheet.

(A2242.) This "alternative" conclusion was in error. The evidence establishes, at the very least, factual issues regarding Mesaba's intent and good faith in its negotiations with Plaintiffs toward long-term leases. That issue, therefore, could not be resolved in the context of a summary judgment motion.[7]

The District Court also failed to recognize that Mesaba's purported breach of a Type II preliminary agreement would not support its ruling that the Proposal "expressly grants FLI the authority to determine the lease duration within the range of 72 to 96 months." New York courts repeatedly have stated that the breach of a

[7] The District Court's ruling is reviewed *de novo* by this Court. See County of Mille Lacs, 361 F.3d at 463.

Type II preliminary agreement does not entitle the non-breaching party to demand performance of the contemplated, but never completed transactions.

1. The factual issue of whether Mesaba was negotiating in good faith cannot be resolved in the context of a summary judgment motion.

The evidence viewed in a light most favorable to Mesaba supports the conclusion that, after signing the Proposal in March 1996, the parties continued for nearly three years to negotiate in good faith toward long-term leases on the 340A aircraft. Those negotiations failed after Saab Aircraft AB announced that it would no longer manufacture commercial aircraft.

FLI's former CEO acknowledged that Mesaba negotiated in good faith:

> A: I think the parties diligently set out to negotiate final documentation and for a number of reasons were not able to get to a final point on a number of issues.

(A71.) He stated that "all the parties" participated in the subsequent negotiations to "the best of their ability." (A73.) He also acknowledged that "the discontinuation of an aircraft program is a great concern to the operators." (A78 (emphasis added).) Because the parties were unable to agree on long-term leases, they continued to negotiate and eventually agreed in writing that the 340A aircraft would continue to be leased "on the same terms and conditions" as the written short term leases, except for the "term of such leases which is subject to further agreement of the parties." (A210, 1368.)

Federal courts applying New York law repeatedly have stated the determination of a party's intent or good faith is a factual issue that is "notoriously inappropriate" for resolution in the context of a summary judgment motion. See, e.g., Krishna v. Colgate Palmolive Co., 7 F.3d 11, 16 (2nd Cir. 1993); Leberman v. John Blair & Co., 880 F.2d 1555, 1560 (2nd Cir. 1989). In this case, the evidence supports and, at the very least, creates factual issues regarding Mesaba's contention that it fulfilled any obligation it had to negotiate in good faith.

This same evidence also supports Mesaba's contention that those negotiations failed, not because of bad faith, but because the parties were unable to come to acceptable terms for long-term leases following Saab Aircraft AB's announcement that it was discontinuing the product line and exiting the turbo-prop business—a fact which FLI acknowledged was a "great concern" to operators like Mesaba. (A78.) After Saab made this announcement, the parties continued to negotiate and ultimately agreed to continue flying the aircraft under the terms of the short-term leases and leave the duration of those leases open to further agreement. Whether Mesaba's actions constitute bad faith is a fact question for a jury. Accordingly, the District Court erred in finding that, as a matter of law, Mesaba breached any obligation it had to continue negotiating in good faith.

2. Even if Mesaba had breached an obligation to negotiate in good faith, Plaintiffs would not be entitled to demand performance of the long-term leases contemplated by the Proposal.

The District Court's "alternative" ruling was also flawed because, even if Mesaba had breached an obligation to negotiate in good faith, that breach would not entitle Plaintiffs "to determine the lease duration within the range of 72 to 96 months." (A2247.) A party to a Type II preliminary agreement "has no right to demand performance of the transaction," and the breach of a Type II preliminary agreement does not give rise to a claim for lost profits. See Adjustrite, 145 F.3d at 548; Gorodensky, 92 F. Supp. 2d at 255 n.2; Goodstein Constr. Corp., 604 N.E.2d at 1360-61. The District Court therefore erred in its conclusion that Mesaba's purported breach of its obligation to negotiate in good faith entitled FLI to dictate the terms of the long-term lease agreements contemplated by the Proposal.

IV. The District Court Erred In Concluding That Plaintiffs' Declaratory Judgment Claims Are Not Time-Barred.

The Proposal established a specific deadline of April 15, 1996 for the parties "to negotiate, execute and deliver definitive documentation" of the contemplated transactions. (A89.) The parties extended that deadline by written agreement to August 30, 1996. (A98.) Accordingly, if Mesaba had any obligation to negotiate and/or execute the Financing Agreement and long-term leases, that obligation was

breached on August 30, 1996. Plaintiffs filed their declaratory judgment action on October 4, 2002, more than six years after that breach would have occurred.[8]

New York law requires that "an action upon a contractual obligation or liability" be commenced within six years. N.Y. C.P.L.R § 213(2) (2002). "[A] cause of action for breach of contract accrues and the statute of limitations commences when the contract is breached." Raine v. RKO General, Inc., 138 F.3d 90, 93 (2nd Cir. 1998). A claim for the breach of contract accrues when a deadline passes without performance. See, e.g., East River Sav. Bank v. Secretary of HUD, 702 F. Supp. 448, 459 (S.D.N.Y. 1988); G.P. Putnam's Sons v. Owens, 378 N.Y.S.2d 637, 638 (N.Y. App. Div. 1976); State v. Fenton, 414 N.Y.S.2d 58, 59 (N.Y. App. Div. 1979). The statute runs from the time of breach, even if no damage occurs until later. Ely-Cruikshank Co., Inc. v. Bank of Montreal, 615 N.E.2d 985, 987 (N.Y. 1993)

In a contract to negotiate with no final date specified, parties are given a reasonable time in which to conclude negotiations. If a deadline is specified, however, breach will occur upon that date. See Schmidt v. McKay, 555 F.2d 30, 35-36 (2nd Cir. 1977). The six-year statute of limitations will begin to run upon breach, even though incidental matters relating to the agreement remain open.

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[8] The District Court's conclusion that Plaintiffs' claim is not time-barred as a matter of law is reviewed *de novo* by this Court. See McCuskey v. Central Trailer Services, Ltd., 37 F.3d 1329, 1330-31 (8th Cir. 1994).

State of New York v. Lundin, 459 N.E.2d 486, 487-488 (N.Y. 1983) (continuation of the parties' ongoing relationship beyond the date of construction completion did not serve to extend the statute of limitations date).

The fourth and last "Term Sheet Modification" between Mesaba, FLI and SAAI indicates that the date by which the parties "shall complete negotiation, execution and delivery of definitive documentation of the terms set forth in the Term Sheet" was extended to August 30, 1996. (A98.) Plaintiffs knew this was a "deadline" and were concerned about the "potential risks involved" if this deadline were not met. (A1561, 1568, 1609.) This unequivocal deadline represents the date of potential breach, and thus, the initiation of the statutory limitations period, even if the parties continued their relationship outside of the Proposal. See Schmidt, 555 F.2d at 35; Lundin, 459 N.E.2d at 487. Because Plaintiffs did not file their suit until October 4, 2002, the statute of limitations bars their claim.

The District Court rejected this argument and found that a "new contract" arose when the parties continued to negotiate past the August 30, 1996 deadline.

> "When an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old." Martin v. Campanaro, 156 F.2d 127, 129 (2nd Cir. 1946).

(A2242-43.) In Martin, however, the text quoted by the District Court was immediately followed by the following statement:

> Ordinarily, the existence of such a new contract is determined by the 'objective' test, i.e., whether a reasonable man would think the parties intended to make such a new binding agreement—whether they acted as if they so intended.

Martin, 156 F.2d at 129. Applying this test, the Second Circuit in Martin found that the subsequent course of conduct between the parties, including unsuccessful negotiations for a new contract, compelled the conclusion that there was no new agreement. See id. Other New York courts applying this same test have similarly determined that a subsequent course of unsuccessful negotiations prevents the formation of a new implied contract:

> In Martin, the Court of Appeals held that where an agreement expires by its terms, and "without more," the parties continue to perform, "an implication" arises that they have mutually assented to a new contract containing the same provisions as the old." The existence of this "contract implied in fact" is determined using the "reasonable person" test. Here, however, there is "more" indeed. The Martin court also found that where, as here, the parties had engaged in "subsequent unsuccessful negotiations" to enter into a new contract, a reasonable person would not believe the parties intended to form a new contract extending the terms of the old.

Sevel Argentina, S.A. v. General Motors Corp., 46 F. Supp. 2d 261, 268 (S.D.N.Y. 1999) (citations omitted). In this case, the parties' "subsequent unsuccessful negotiations" likewise compels the conclusion that no new contract was implied in fact.

Plaintiffs brought suit seeking a declaration of the terms of the Proposal. They did not allege, and have never claimed that, there was a subsequent "contract implied in fact." Plaintiffs' claim accrued on August 30, 1996 and was time-barred

six years later, on August 30, 2002. Even if Plaintiffs had alleged the existence of a new "contract implied in fact," the District Court could not, in the context of a summary judgment motion, apply the "reasonable person" standard to determine whether any such contract existed. The terms of any such contract, if it were found to exist, would necessarily include and reflect the parties' subsequent course of conduct. The District Court therefore erred in concluding that Plaintiffs' claim for a declaration of the terms of the Proposal is not barred by New York's six-year statute of limitations.

CONCLUSION

Plaintiffs' Complaint alleged that the Proposal, by itself, constituted a binding contract. That claim fails as a matter of law because there was "no complete agreement on all of the issues that require[d] negotiation" and because the Proposal expressly made the contemplated lease transactions contingent on the negotiation and completion of "definitive" binding agreements. Plaintiffs' declaratory judgment claim, as alleged, is also time-barred because it was brought more than six years past the express deadline to "negotiate, execute, and deliver" definitive agreements.

The District Court concluded that the Proposal, as modified and supported by the parties' subsequent course of conduct, was a binding contract. Alternatively, the District Court concluded that Mesaba breached an obligation to negotiate in good faith. The District Court further concluded that Plaintiffs' claims are not time-barred because a new contract, "implied in fact," arose from the parties' subsequent course of conduct. None of these issues was before the District Court. Each of these issues necessarily involves material factual disputes that cannot be resolved in the context of a summary judgment motion. The District Court erred therefore in construing the terms of any new or amended contract arising out of the parties' subsequent conduct and by concluding, as a matter of law, that Mesaba acted in bad faith.

Mesaba respectfully requests that this Court vacate the District Court's final judgment and remand this matter with instructions to enter judgment in favor of Mesaba. Plaintiffs' Complaint alleged only the existence of a "Type I" binding contract. As a matter of law, Mesaba is entitled to summary judgment because the Proposal is not a "Type I" binding contract, because Plaintiffs' claim for declaratory relief is barred by the six year statute of limitations, and because Mesaba's purported breach of a "Type II" preliminary agreement does not entitle Plaintiffs to enforcement of the contemplated transaction.

If, for any reason, this Court reaches those issues that were not alleged by Plaintiffs but were addressed by the District Court, Mesaba alternatively asks that this matter be remanded for trial. A jury should be allowed to determine whether a new or amended contract arose from the parties' subsequent course of conduct, to determine the terms of that implied contract if it exists, and to determine whether Mesaba satisfied any obligation it had to negotiate in good faith toward the execution of long-term leases.

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ADDENDUM INDEX